No. 83-1501

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALEAN HESTER FAUST, ADMINISTRATRIX OF THE ESTATE OF CHARLES LONNIE FAUST, ET AL., PETITIONERS

v.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

LEONARD SCHAITMAN
MICHAEL KIMMEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the United States owed a duty, enforceable under the Suits in Admiralty Act, to require the owner of a cable ferry either to improve its marking or to remove the cable ferry.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B154) and the opinion dissenting from the denial of rehearing (Pet. App. A1-A7) are reported at 721 F.2d 934. The opinion of the district court (Pet. App. C1-C109) is reported at 527 F. Supp. 1021.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1983 (Pet. App. D1-D2). A petition for rehearing was denied on December 13, 1983 (Pet. App. A1-A7). The petition for a writ of certiorari was filed on March 12, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2 of the Suits in Admiralty Act, 46 U.S.C. 742; 14 U.S.C. 81, 86; and Sections 10 and 15 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, 409, are reproduced at App., *infra*, 1a-4a.

STATEMENT

1. On December 11, 1977, Charles Lonnie Faust, accompanied by petitioners Tommy Bennett and Curtis Muldrow, was operating an 18-foot motorboat in the intercoastal waterway near Georgetown, South Carolina. Following a day of fishing, they were proceeding after dark at about 6:10 p.m. in a southerly direction at a speed of 15 to 25 m.p.h. in the Estherville-Minim Canal, which divides the mainland from South Island. They did not have on board the local navigational chart for this area (Pet. App. B25, B37, C76). The chart cautioned that a cable ferry operated between the mainland and South Island, and that its cable obstructed navigation when in operation.[1] Nor did any of the three boatmen keep a sufficient lookout to observe large lighted signs on each side of the canal 500 feet from the cable which stated that speed was limited to 5 m.p.h., "CAUTION," "STOP ON RED," and "CABLE ABOVE WATER WHEN FERRY IN OPERATION" (Pet. App. B7-B8, C25-C27). The motorboat hull ran under the cable while the ferry (showing a red-flashing light) was in operation, killing Faust instantly and injuring Bennett and Muldrow.

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[1]The relevant local navigational chart (No. 11534), as updated by a June 8, 1977 notice to mariners, contained the following warning at the charted location of the ferry: "CAUTION (see note B) Cable Ferry." The adjacent Note B stated: "CAUTION The South Island Ferry's cable is suspended four feet above water during operation and is dropped to the bottom only when the ferry is moored to the east side. Warning signs north and south of the ferry are topped with red lights which flash when the ferry is in operation. There are also flashing red lights on the ferry itself." See C.A. App. 420, 438-439, 1333.

The cable ferry and its appurtenances were owned and operated by respondent South Carolina State Highway Department pursuant to a permit issued by the Army Corps of Engineers. After this accident, which followed others in the 37-year history of the cable ferry, South Carolina replaced the cable ferry with a self-propelled ferry (Pet. App. C20).

2. Faust's widow (in her capacity as administratrix of his estate), Bennett and Muldrow each brought damages actions in the United States District Court for the District of South Carolina against the South Carolina State Highway Department, as the owner and operator of the cable ferry, and against the United States under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.* The actions were consolidated and tried without a jury.

At the conclusion of the trial, the district court ruled that both the South Carolina Highway Department and the United States were negligent with respect to the cable ferry; that the negligence of each contributed equally to the accident; and that none of the petitioners was contributorily negligent (Pet. App. C1-C109). The court entered judgment in favor of Faust for $499,069, in favor of Muldrow for $18,000, and in favor of Bennett for $5,000.

The district court predicated South Carolina's liability on asserted negligent marking, warning and/or failure to remove a hazardous obstruction to navigation (Pet. App. C87-C90). The court predicated the liability of the United States on asserted omissions of the Coast Guard and the Army Corps of Engineers in their safety regulation of the cable ferry (*id.* at C92-C100). Citing 14 U.S.C. 81 and 86, the court concluded that the Coast Guard "failed to provide or require adequate markings at the crossing" (Pet. App. C97). Regarding the Corps of Engineers, the court, citing the River and Harbors Appropriation Act of 1899, 33

U.S.C. 401 *et seq.*, held it to be "negligent in failing to require the [South Carolina] Highway Department to remove the cable which constituted a hazard and obstruction to navigation" (Pet. App. C99).

3. The court of appeals reversed the district court's judgment of liability with respect to both South Carolina and the United States (Pet. App. B1-B154). The court of appeals expressed the view that South Carolina, if otherwise "amenable to suit * * * should be held liable to some extent" (*id.* at B24),[2] but it concluded that the Eleventh Amendment "insulates it from a judgment rendered by a federal court" (Pet. App. B23 (footnote omitted); see *id.* at B23-B31).

The court of appeals concluded that there was "no negligence on the part of the United States, and it is entitled to judgment as a matter of law" (Pet. App. B3; see *id.* at B9-B23). Analyzing the claim against the United States in terms of whether acts or omissions of the Coast Guard or Corps of Engineers "violated some statutory or common law duty" (*id.* at B11), the court of appeals held that none of the statutes relied on by petitioners (14 U.S.C. 81, 86, and 33 U.S.C. 403) created a statutory duty on the part of these federal agencies to assume the direct obligation of improving the marking of, or removing, a "purposefully constructed" (Pet. App. B15), state-owned and operated facility for transportation across this navigable waterway (*id.* at B12-B19). As for an alleged common law duty to mark or

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[2]The court of appeals noted that the district court's finding that petitioners were not contributorily negligent as a result of alcohol consumption was not clearly erroneous (Pet. App. B24-B25). The court added, however, that "there was other evidence of negligence—operating at excessive speed at night, without lights and without charts, in unknown waters—and we have no doubt that there was some negligence on the part of decedent and perhaps the other plaintiffs" (*id.* at B25).

remove, the court of appeals held that the United States had not induced reliance on its own navigational aids under *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), because here, unlike in *Indian Towing*, it was a separate party (South Carolina) rather than the federal government that was "directly responsible for the safety devices installed" (Pet. App. B23; see *id.* at B19-B23). The court of appeals accordingly held that there was no basis under either statute or common law for holding the United States liable in this case for any negligent marking or maintenance by South Carolina of its cable ferry (*id.* at B23).

ARGUMENT

The court of appeals held in this case that the United States is under no enforceable statutory or common law duty to require improved marking or removal of state transportation facilities on navigable waters. The decision below is correct, does not conflict with the decisions of this Court or other courts of appeals, and does not warrant review.

1. Liability of the United States under the Suits in Admiralty Act is limited to cases where "if a private person * * * were involved, a proceeding in admiralty could be maintained." 46 U.S.C. 742. The court of appeals correctly concluded that the federal government was under no statutory duty to mark or remove South Carolina's cable ferry.

a. A private owner of a wreck sunk in a navigable channel has a duty to mark or remove it, 33 U.S.C. 409, and is liable under the law of admiralty for unreasonable failure to do so. See *Reading Co.* v. *Pope & Talbot, Inc.*, 192 F. Supp. 663, 666-667 (E.D. Pa.), aff'd, 295 F.2d 40 (3d Cir. 1961). The United States would be similarly responsible as a "private person" (46 U.S.C. 742) in the case of its own wrecked vessels.

In the case of obstructions other than wrecks in navigable waters, responsibility for marking, maintenance, and (if necessary) removal also depends primarily on ownership of the obstruction. See *Norfolk & Western Co.* v. *United States*, 641 F.2d 1201, 1213 (6th Cir. 1980) (removal of collapsed dock and debris). With respect to federally-owned structures having a lawful purpose (*e.g.*, breakwaters and dams), the government meets its marking responsibility if its charted or other warnings do not mislead. See *Magno* v. *Corros*, 630 F.2d 224, 228 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981). See also *Chute* v. *United States*, 610 F.2d 7, 14 (1st Cir. 1979), cert. denied, 446 U.S. 936 (1980); *Gemp* v. *United States*, 684 F.2d 404, 408 (6th Cir. 1982); *Estate of Callas* v. *United States*, 682 F.2d 613, 623 (7th Cir. 1982). If an intended structure in navigable waters is established, owned and operated by a state or private party under a Corps of Engineers permit, the direct responsibility for safe marking and maintenance lies with that owner. See 14 U.S.C. 86. The Coast Guard's role under Section 86 is simply that of safety regulator, unless by agreement or otherwise it takes over the direct duty of safe marking and maintenance. Because the federal government in this case never owned or operated the cable ferry, and because the Coast Guard never assumed the owner's duty of marking that facility, the court of appeals correctly held that the United States owed no duty to third persons injured by any faulty marking or maintenance of the cable ferry.

b. Petitioners appear to argue (Pet. 41-46), however, that the Coast Guard was negligent in failing to exercise its discretionary marking authority under 14 U.S.C. 86. Section 86 states in part that the Coast Guard "may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters." Contrary to petitioners' contentions, the existence of this discretionary authority does not create an enforceable duty under the

Suits in Admiralty Act. First, as the court of appeals held (Pet. App. B14-B15), Section 86 imposes no duty upon the Coast Guard to mark purposefully constructed obstructions serving proper purposes. Second, as several courts of appeals have concluded, the Suits in Admiralty Act should be construed to include an exception for discretionary governmental functions. See *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1085-1087 (D.C. Cir. 1980) (Coast Guard refusal to issue permit for port entry); *Bearce* v. *United States*, 614 F.2d 556 (7th Cir.), cert. denied, 449 U.S. 837 (1980) (failure to place an additional marker on a breakwater); *Gercey* v. *United States*, 540 F.2d 536 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977) (failure to compel removal from service of a decertified passenger vessel). See also *Gemp* v. *United States*, 684 F.2d 404, 408 (6th Cir. 1982) (Corps of Engineers' restriction of waters near dam).

Suits brought under the Federal Tort Claims Act are subject to an exception for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). There is no basis for concluding that Congress intended to remove the discretionary function exception (and, sub silentio, to subject the government to new tort liability) when it transferred certain maritime tort actions from the Federal Tort Claims Act to the Suits in Admiralty Act in 1960. Indeed, the legislative history demonstrates that the amendment was intended only to remove the confusion concerning the respective jurisdictions of the federal district courts and the Court of Claims. See S. Rep. 1894, 86th

Cong., 2d Sess. 6 (1960). See also *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 175-176 (1976).[3]

Nothing has occurred since the denials of certiorari in *Bearce* and *Gercey* to make this question worthy of review. Petitioners contend (Pet. 34) that review by this Court is warranted because the decision below conflicts with the court of appeals' earlier decision in *Lane* v. *United States*, 529 F.2d 175 (4th Cir. 1975), and the Fifth Circuit's decision in *De Bardeleben Marine Corp.* v. *United States*, 451 F.2d 140 (1971). This contention is without merit. The Fifth Circuit in *De Bardeleben*, 451 F.2d at 146 & n.15, stated in dictum that a discretionary function exception should not be read into the Suits in Admiralty Act. But this statement was made in passing, in a case in which the court held that, for other reasons, the government was not subject to suit. Moreover, *Lane* is distinguishable from this case because it involved an abandoned wreck with respect to which the government was in the position of constructive owner (529 F.2d at 177), whereas this case involves a permitted obstruction that was owned and operated by a state agency and that served a lawful purpose. In any event, to the extent that the court of appeals in this case implicitly held that there is a discretionary function exception in the Suits in Admiralty Act, that would bring the Fourth Circuit in line with the holdings of all the other courts of appeals that have directly addressed the question and would diminish the need for this Court to grant review. In this regard, we note that insofar as the decision below may be inconsistent with *Lane*, this

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[3]Prior to the passage of the Suits in Admiralty Act, the "discretionary function" exception had regularly been applied in Federal Tort Claims Act cases within the federal courts' admiralty jurisdiction. See, *e.g.*, *Kline* v. *United States*, 113 F. Supp. 298 (S.D. Tex. 1953); *Westchester Fire Ins. Co.* v. *Farrell's Dock & Terminal Co.*, 152 F. Supp. 97, 98 (D. Mass. 1957).

Court does not sit to resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

In the present case, the Coast Guard's determination not to undertake direct responsibility for marking the cable ferry, but rather to continue in its regulatory role, was undoubtedly "a basic policy judgment as to how the public interest may best be promoted" (*Gercey* v. *United States*, 540 F.2d at 538), and is thus well within the discretionary function exception. As 14 U.S.C. 86 makes clear, the Coast Guard's decision that it would not itself undertake to mark the cable ferry did not relieve the South Carolina State Highway Department, the owner of the ferry, from its duty and responsibility to mark it.[4]

c. For the same reasons, the court of appeals also correctly held that the Army Corps of Engineers' power under the Rivers and Harbors Appropriation Act 1899, 33 U.S.C. 403, to approve, deny or revoke permits for private or state-owned structures in navigable waters created no duty in the Corps enforceable in a damages action under the Suits in Admiralty Act. To the best of our knowledge, no court has ruled to the contrary.[5] Corps authorization of structures in navigable waters is outside the ambit of the

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[4]We note that the on-site warnings for the cable ferry had been improved following consultations between federal and South Carolina officials in the wake of a prior accident that was litigated in *Doyle* v. *United States*, 441 F. Supp. 701 (D. S.C. 1977). See Pet. App. B8.

[5]The Fifth Circuit in two decisions has imposed liability on the government under the Suits in Admiralty Act for damage to pipelines caused by dredging activities authorized by the Corps, on the theory that the Corps misled the dredging operator into believing that no pipeline was present, or had a duty to warn of pipelines on government charts. *Michigan Wisconsin Pipeline Co.* v. *Williams-McWilliams Co.*, 551 F.2d 945 (1977); *Southern Natural Gas Co.* v. *Pontchartrain Materials, Inc.*, 711 F.2d 1251, 1257 (1983). These decisions do not hold that the structure itself (the pipelines) should not have been permitted.

Suits in Admiralty Act because such authorization is based on a discretionary assessment of various and possibly conflicting public interests in use and management of navigable waters (here, balancing the navigational interest against the interest in reasonable access to South Island) under the broad authority of 33 U.S.C. 403. See *Boston Edison Co.* v. *Great Lakes Dredge & Dock Co.*, 423 F.2d 891, 894-897 (1st Cir. 1970).[6]

When the Corps of Engineers issues a permit for a structure that creates some obstruction to navigation, the permit is conditioned, as here, on appropriate marking by the owner-permitee. If a permit has been duly issued, and has not been revoked or breached, the private owner is under no statutory obligation to remove the structure. 33 U.S.C. 403, 406. The United States may be liable if a permitted obstruction to navigation is negligently omitted from a relevant government-issued navigational chart, resulting in reasonable and detrimental reliance on the chart. See *De Bardeleben Marine Corp.* v. *United States*, 451 F.2d at 148-149.[7] But it is not liable for permitting a private or state party to establish or maintain a structure in navigable waters.

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[6]In *California* v. *Sierra Club*, 451 U.S. 287 (1981), this Court held that 33 U.S.C. 403 did not create a private cause of action to enforce its prohibition against unpermitted structures. The Court observed that this provision was broadly designed "to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers [and waterways] caused by bridges and similar structures." 451 U.S. at 295.

[7]Here, the relevant government chart (as amended before this accident) amply warned of the cable ferry and was not found defective by the courts below. Compare *Transorient Navigators Co., S.A.* v. *M/S Southwind*, 714 F.2d 1358, 1365 (5th Cir. 1983) (Corps of Engineers' failure to publish information regarding changes in channel conditions caused by dredging).

2. Finally, the court of appeals properly rejected petitioners' contention (Pet. 37-41), in reliance upon *Indian Towing Co.* v. *United States, supra,* that the government breached a common law duty to mark or remove the cable ferry. As the court observed (Pet. App. B20-B21):

> The principle laid down in *Indian Towing* requires no more than that the government not injure sailors or boaters by inducing reliance on misleading navigational aids. It imposes no general duty upon the government to ensure navigable waters are safe or to provide warning devices.

Under this approach, if the government were to assume the duty of marking a privately-owned obstruction under 14 U.S.C. 86, it might then become obligated to do so in a reasonable manner, so as to avoid increasing the hazard or engendering detrimental reliance, just as in the case of regular aids to navigation that it maintains under the general authority of 14 U.S.C. 81. See, *e.g., Tringali Bros.* v. *United States,* 630 F.2d 1089 (5th Cir. 1980); *Afran Transport Co.* v. *United States,* 435 F.2d 213 (2d Cir. 1970), cert. denied, 404 U.S. 872 (1971). But where, as here, the government does not provide such marking services itself, its function remains simply that of exercising discretion to admonish private parties to mark their structures in accordance with applicable law. This exercise of discretion does not subject the government to liability under the Suits in Admiralty Act.[8]

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[8]The dissenting opinions of Judge Wyzanski proceed on the assumption that the United States should be liable in this case as putative "owner" of this portion of the intercoastal waterway, and that its duty was to maintain this maritime "highway" free of hazards or to directly warn thereof, in the same manner as a municipality in the case of public roads (Pet. App. A5-A6, B92-B93, B99). The dissent cites no case supporting this theory of recovery. Moreover, the theory is contrary to case law holding that the United States does not insure that the nation's

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

LEONARD SCHAITMAN
MICHAEL KIMMEL
Attorneys

MAY 1984

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waterways are free of obstructions (see *Canadian Pacific (Bermuda) Ltd.* v. *United States*, 534 F.2d 1165, 1168 (5th Cir. 1976)), and is also contrary to statutory law making the owner of an obstruction responsible for marking. See 14 U.S.C. 86.

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APPENDIX

1. Section 2 of the Suits in Admiralty Act, 46 U.S.C. 742, provides:

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

2. 14 U.S.C. 81 provides:

In order to aid navigation and to prevent disaster, collisions, and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate:

(1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States,

(2) aids to air navigation required to serve the needs of the armed forces of the United States peculiar to warfare and primarily of military concern as determined by the Secretary of Defense or the Secretary of any department within the Department of Defense and as requested by any of those officials; and

(3) electronic aids to navigation systems (a) required to serve the needs of the armed forces of the United States peculiar to warfare and primarily of military concern as determined by the Secretary of Defense or any department within the Department of Defense; or (b) required to serve the needs of the maritime commerce of the United States; or (c) required to serve the needs of the air commerce of the United States as requested by the Administrator of the Federal Aviation Administration.

These aids to navigation other than electronic aids to navigation systems shall be established and operated only within the United States, the waters above the Continental Shelf, the territories and possessions of the United States, the Trust Territory of the Pacific Islands, and beyond the territorial jurisdiction of the United States at places where naval or military bases of the United States are or may be located. The Coast Guard may establish, maintain, and operate aids to maritime navigation under paragraph (1) of this section by contract with any person, public body, or instrumentality.

14 U.S.C. 86 provides:

The Secretary may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters or waters of the continental shelf of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require. The owner of such an obstruction shall be liable to the United States for the cost of such marking until such time as the

obstruction is removed or its abandonment legally established or until such earlier time as the Secretary may determine. All moneys received by the United States from the owners of obstructions, in accordance with this section shall be covered into the Treasury of the United States as miscellaneous receipts. This section shall not be construed so as to relieve the owner of any such obstruction from the duty and responsibility suitably to mark the same and remove it as required by law.

3. Section 10 of the River and Harbors Appropriation Act of 1899, 33 U.S.C. 403 provides:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Section 15 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 409, provides:

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels

or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.